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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 64

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners,

v.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE.

On Appeal From the Court of Appeals of the State of Maryland.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND, AND BRIEF IN SUPPORT THEREOF.

RAYMOND S. WILLIAMS,
THOMAS J. TINGLEY,

Counsel for Petitioners.

Baltimore, Maryland,
April 27th, 1929.

King Bros., Inc., Printers, 208 N. Calvert St., Baltimore, Md.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 826.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners,

v.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE.

On Appeal From the Court of Appeals of the State of Maryland.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, respectfully shows to this Honorable Court:

A.

Summary Statement of The Matter Involved.

On August 1, 1927, The United Railways and Electric Company of Baltimore, hereinafter called the Company, filed with your petitioners, constituting the Public Service Commission of Maryland, hereinafter called the Commis-

sion, an application for an increase in its rates of fare for street railway service in the City of Baltimore, Maryland, and its environs, from eight cents cash, with two tokens for fifteen cents, the then prevailing rate, to a flat ten cent rate, with special half fare and commutation rates (R. 89). After lengthy hearings, the Commission, on February 10th, 1928, denied the application for a flat ten cent fare, but authorized the charging of a nine cent fare, with three tokens for twenty-five cents (R. 57).

The Commission found that the fare fixed by it would yield the Company a return of 6.26 per cent. on the value of its property, which value was fixed at $75,000,000 (R. 48), and which is not in this Court disputed (R. 1631, 1661).

The Commission, in estimating the expenses of the Company, calculated the annual allowance for depreciation so as to restore to the Company the original cost of its property consumed or retired in service, although the basis of calculation actually adopted was to allow an amount equal to five per cent. of the Company's gross revenue (R. 48). When in 1912 the Company first set up a depreciation account, it used the basis just described, and the uniform practice of the Commission in dealing with the Company has been to use the same basis.

Being dissatisfied with the Order of the Commission, the Company, on March 13th, 1928, filed its Bill of Complaint in the Circuit Court No. 2 of Baltimore City, seeking to vacate and enjoin the Order of the Commission (R. 5-13). The Bill alleged in substance that the Order of the Commission was confiscatory and contrary to the Fourteenth Amendment to the Constitution of the United States, and deprived the Company of its property without due process of law, because (1) the fares fixed by said Order would result in an inadequate rate of return on the value of the Company's property; (2) the annual allowance for depreciation was inadequate and was fixed on an improper basis, and (3) the said Order of the Commission further diminished the inadequate return to be received by the Company

by reason of the fact that the Company's second fare zone on its Halethorpe line was abolished and a single fare substituted.

The Circuit Court No. 2 of Baltimore City sustained all of the contentions of the Company with the exception of that as to the Halethorpe line. That is to say, the lower Court held that the rate of return resulting from the 8 1/3 cent fare was confiscatory, and that the annual depreciation allowance should not have been based on cost, but should have been based on the present value of the Company's depreciable property, and the Order of the Commission in these respects was accordingly vacated, and an injunction issued prohibiting the Commission from enforcing its said Order, in so far as the same limited the rates of fare to be charged by the Company (R. 85-86).

Thereupon the Commission took an appeal to the Court of Appeals of Maryland, the highest Court in the State, and the Company took a cross-appeal. The questions thereby raised by the Commission were:

1. Whether the lower Court was right in holding that the rates of fare fixed by the Commission resulted in an insufficient rate of return to the Company;

2. Whether the lower Court was right in requiring the annual depreciation allowance to be so calculated as to restore present value rather than cost.

The question raised by the Company's cross-appeal was whether the lower Court was right in sustaining the Commission's Order abolishing the second fare zone on the Company's Halethorpe line.

The Court of Appeals held (R. 1653,1622):

1. That the rate of return of 6.26 per cent. on the value of the Company's property, which would be produced by the rates of fare fixed by the Commission,

was neither confiscatory nor unreasonable as a matter of law (R. 1647), and that, therefore, the decree of the lower Court vacating the Order of the Commission fixing the schedule of fares to be charged by the Company, and enjoining the Commission's Order in that respect, was erroneous;

2. That the lower Court was right in holding that the annual allowance for depreciation should have been based by the Commission not on cost, but on value, and that that part of the decree of the lower Court should neither be affirmed nor reversed, but the case should be remanded in order that the Commission might further consider the question of depreciation and make any changes in the rate schedule that might be necessary and requisite to yield to the Company a fair and reasonable rate of return (i. e., not more than 6.26 per cent. upon the fair value of the Company's property); and

3. That that part of the decree of the lower Court which affirmed the order of the Commission, extending the first fare zone of the Halethorpe line to the terminus thereof, should be affirmed.

Thereupon the Company appealed to this Court on the ground that the decree of the Court of Appeals deprived it of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. This appeal was filed in this Court on September 21, 1928, and was No. 464, October Term, 1928.

The Commission filed in this Court its cross-appeal No. 465, October Term, 1928, simultaneously with the filing of the Company's appeal, raising the question as to whether it is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States to so calcu-

late the annual allowance of the Company for depreciation as to restore the original cost, rather than present day value, of depreciable property consumed or retired in service. It filed a petition for a writ of certiorari, on the same grounds as a motion in this case.

This Court, on November 19th, 1928, dismissed both appeals, and denied the petition for certiorari, on the ground that the decree of the Court of Appeals, called into question, was not final, within the meaning of Section 237 (a) and 237 (b) of the Judicial Code of the United States.

Meanwhile the Commission had made a thorough investigation of the condition of the property of the Company, pursuant to the direction of the Court of Appeals, had held hearings with reference thereto, and entered its Opinion and Order No. 13420, dated November 28th, 1928, increasing the Company's annual depreciation allowance to $1,638,660, computed on a basis of value, or $755,116 more than the original allowance of $883,544, calculated to restore cost, of property consumed or retired in service, and increasing the fare charged by the Company to the public to ten cents cash, with four tokens for thirty-five cents (R. 1691).

On December 12th, 1928, the Company filed in the Circuit Court No. 2 of Baltimore City its Supplemental Bill of Complaint (R. 1681), containing the same allegations as to rate of return and the extension of the single fare zone to Halethorpe as did the Original Bill of Complaint, and reciting the proceedings above outlined regarding the question of depreciation, but not complaining of the Commission's action with respect thereto. This Supplemental Bill was dismissed on January 10th, 1929 (R. 1705), and this action affirmed by the Court of Appeals on March 20th. 1929 (R. 1712).

Thereupon the Company again appealed to this Court, the appeal being filed on March 27th, 1929, and being No. 792, October Term, 1928. The Commission has also again appealed with respect to the proper basis for calculating the annual depreciation allowance, its appeal being No. 826, October Term, 1928.

The transcript of the record of the aforesaid appeal and cross-appeal, Nos. 792 and 826, October Term, 1928, is referred to and adopted as the certified transcript of the record required to be filed under Rule No. 38 of this Court with this petition for writ of certiorari.

B.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Court of Appeals of Maryland determines a Federal question of substance not heretofore determined by the Supreme Court of the United States,—*i. e.*, whether the Company would be deprived of its property without due process of law, within the prohibition of the Fourteenth Amendment to the Constitution of the United States, by the action of a State regulatory body, (*i. e.*, the Public Service Commission in this case), in calculating the Company's annual allowance for depreciation so as to restore to the Company the cost of its depreciable property consumed or retired in service, rather than the present value thereof.

2. The decision of the Court of Appeals of Maryland, holding, as it does, that the annual depreciation allowance of the Company should be so calculated as to restore to the Company the present value of its depreciable property, instead of the cost thereof, is not in accord with applicable decisions of this Court in cases involving related questions.

3. The decision of the Court of Appeals of Maryland to the effect that the determination of the annual depreciation allowance of the Company so as to restore the cost, rather than the present day value, of depreciable property consumed or retired in service, would deprive the Company of property without due

process of law within the prohibition of the Fourteenth Amendment of the Constitution of the United States, determines a Federal question of substance by a ruling untenable and in conflict with the weight of authority.

4. The Order of the Commission is a "statute" of the State of Maryland within the meaning of Section 237 (b) of the Judicial Code of the United States, as amended by the Act of Congress of February 13th, 1925, (43 Stat. L. 937), and is not invalid, (as held by the Court of Appeals of Maryland), as repugnant to the Constitution of the United States.

WHEREFORE, your petitioners respectfully pray that a writ or certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and titled on its docket, No. 52, April Term, 1928, Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, constituting the Public Service Commission of Maryland, Appellants, v. The United Railways and Electric Company of Baltimore, Appellee, and that the said decree of the Court of Appeals of Maryland may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Harold E. West, Chairman, and J. Frank Harper and Steuart Purcell, Members, Constituting the Public Service Commission of Maryland.

RAYMOND S. WILLIAMS,
THOMAS J. TINGLEY,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 826.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners,

v.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Courts Below.

The opinion in the Circuit Court No. 2 of Baltimore City will not be officially reported. It appears at page 65 of the Record. The opinions in the Court of Appeals have not been officially reported as yet. But see 142 Atl. 870. The majority opinion is copied at pp. 1622 *et seq.* of the Record, and was filed July 16th, 1928. See also concurring opinion (R. 1653) and dissenting opinions (R. 1655 and 1656 *et seq.*).

The decree of the Circuit Court No. 2 of Baltimore City dismissing the Company's Supplemental Bill of Complaint appears on p. 1705 of the Record, while the opinion and decree of the Court of Appeals affirming this action appear at p. 1712.

II.

Jurisdiction.

1. The date of the decree to be reviewed is July 16th, 1928 (R. 1622, 1653). The final decree entered by the Court of Appeals disposing of the Company's Supplemental Bill of Complaint, is dated March 20th, 1929.

2. The United Railways and Electric Company of Baltimore, hereinafter called the Company, originally appellee and cross-appellant, and subsequently appellant, in the Court of Appeals of Maryland, contended it was confiscatory and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States for the appellants, constituting the Public Service Commission of Maryland, hereinafter called the Commission, to so fix the annual depreciation allowance of the Company as to restore the original cost, rather than the present day value, of the Company's depreciable property consumed or retired in service, and that the Order of the Commission so fixing the annual depreciation allowance (R. 44 *et seq.*) was therefore invalid as repugnant to the Federal Constitution (R. 9, 10). In other words, the Company contended that the value of depreciable property consumed or retired in service must be restored through the annual depreciation allowance, and that it would otherwise be deprived of its property contrary to the provisions of the Federal Constitution, while the Commission held that the restoration of cost was sufficient and proper. The Court of Appeals of Maryland sustained the contention of the Company (R. 1650).

3. The jurisdiction of this Court is invoked under the provisions of Section 237 (b) of the Judicial Code of the United States, as amended by the Act of February 13th, 1925 (43 Stat. L. 937). The Company attacked the Order of the Public Service Commission fixing its annual depreciation allowance, on the ground that the basing of such an allowance on cost, rather than on value, deprived it of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. The decree of the Court of Appeals sustained this claim of Federal right set up by the Company. The Commission, therefore, is entitled, under Section 237 (b), to make this application for a review of the action of the Court of Appeals by writ of certiorari.

4. Jurisdiction in this Court is believed to be sustained by the doctrine of the following cases:

King Manufacturing Company v. City Council of Augusta, 72 L. Ed. (U. S.) 544.

Ex parte: In the Matter of Thomas E. Williams, Tax Commissioner (May 21, 1928), 72 L. Ed. (U. S.) 591.

While neither of the two cases above cited involved review by certiorari, they sustain the principle that the official order of any regulatory body, such as the Public Service Commission, is a "statute" for jurisdictional purposes, under the United States Judicial Code.

Under Section 237 (b) of that Code, the power of the Supreme Court of the United States to review by certiorari may be exercised as well where the Federal claim is sustained as where it is denied.

5. The decree of the Court of Appeals of Maryland, dated July 16th, 1928, is subject to review in these proceedings, the decree of March 20th, 1929, being final in char-

acter, within the meaning of Section 237 (b) of the Judicial Code.

As Mr. Chief Justice White said in *Louisiana Navigation Co. v. Oyster Commission* (1912), 226 U. S. 99:

> "The rule which excludes the right to review questions arising in a cause depending in a State court until a final judgment is rendered by said court involves as a necessary correlative the power and duty in this court when a final judgment in form is rendered and the cause is brought here for review, to consider and pass upon all the Federal controversies in the cause, irrespective of how far it may be that by the State law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered."

6. The decree of the Court of Appeals of Maryland involves a Federal question reviewable by the Supreme Court of the United States.

Article 23, Section 404 of Bagby's Annotated Code of the Public General Laws of Maryland (1924), which is Section 43 of the Maryland Public Service Commission Law (Md. Acts 1910, Ch. 180), provides, in part, as follows:

> "Any corporation subject to this sub-title, or any of the provisions of this sub-title, and any person in interest being dissatisfied with any order of the Commission, fixing any rate or rates, tolls, charges, schedules, joint rate or rates, or any order fixing any regulations, practices, acts or service, may commence any (an) action in the Circuit Court for any county, or before any judge of the Supreme Bench of Baltimore City, in any court of Baltimore City of appropriate jurisdiction which may be adopted for the purpose, against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is *unlawful*, or that any such regulation, prac-

tice, act or service fixed in such order is *unreasonable*, in which action a copy of the complaint shall be served with the summons." (Italics ours.)

The functions of the Maryland courts in reviewing a decision of the Commission are accordingly limited to the question of whether it is unlawful or unreasonable, or both:

> "The first rule is, the order will not be disturbed except upon clear and satisfactory evidence that it is unreasonable or unlawful. This is a legislative mandate which is reinforced by the fact that the Commission is a tribunal erected by law, informed by experience, and assisted by a trained corps of subordinates."
>
> *Public Service Commission v. Byron* (1927), 153 Md. 464.

It will be noted that the statutory provision in terms purports to limit review of rate-fixing orders to the question of *lawfulness*. No such limitation has been imposed in its judicial construction, however. In the case above cited, the Maryland Court of Appeals held that the Commission has

> "an indivisible power to pass lawful and reasonable orders in the performance of its statutory duties."

In *Interstate Commerce Commission v. Union Pacific Railroad Company* (1912), 222 U. S. 541, cited with approval as to this point by the Court of Appeals in the *Byron* case, *supra*, the content and limits of the two words above used were indicated. At page 547, Mr. Justice Lamar said:

> "In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confisca-

tory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The situations assumed in divisions (5) and (6) of the foregoing outline are instances of an unreasonable, as distinguished from a merely unlawful, order. The use of the word "unreasonable" in the statute does not mean that the Court will substitute its judgment for that of the Commission.

> "If the order be found such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable."
>
> *M., St. P. & S. S. Ry. v. R. R. Comm.,* 136 Wis. 146, cited with approval in the *Pennsylvania Railroad Company* case, *infra.*

The Court of Appeals, in the case of *Pennsylvania R. R. Co. v. Public Service Commission,* said (126 Md. 59, at 78):

> "The whole duty, power and function of the Court in such cases was well summed up by Chief Justice White in *Ill. Cent. R. R. v. Int. Com. Comm.,* 215 U. S. 470, when he said:
>
> " 'Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made, and (c) proposition that we state independently, although in its essence it may

be contained in the previous one, viz., whether although the order may be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule, that the substance and not the shadow determines the validity of the exercise of the power. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions, by setting aside a *lawful* administrative order upon our conception as to whether the administrative power has been *wisely* exercised.' " (Italics ours.)

And the Court of Appeals of Maryland said in the *Byron* case, *supra*:

> "When such a question reaches an appellate tribunal for review in an effort to have the order annulled, the court has no power to substitute its own judgment for that of the Commission, and unless it be made to appear by clear and satisfactory evidence that the order was unreasonable, the courts are powerless to set it aside on that ground."

There is, then, a *prima facie* presumption of reasonableness of the action of the Commission, provided that the action be lawful. Once the lawfulness be established, the Court will not substitute its judgment for that of the Commission, or interfere with the order unless it is manifestly arbitrary. And the arbitrary character must be established by evidence. But if the order be unlawful, by reason, for instance, of repugnance to the Federal Constitution, it might

be said by the Court, as was done in this case, to be unlawful and unreasonable, because unlawfulness is found as a matter of constitutional right, and unreasonableness, assuming the hypothesis of unconstitutionality, follows.

The decision of the Court of Appeals does not rest, as a self-sufficient and independent ground of judgment, on a determination that calculating the annual depreciation allowance so as to restore cost, and not value, of depreciable property, is *unreasonable*. It turns, not on an analysis of testimony, but on a question of law. The Court, after criticising the action of the Commission in *basing* the annual depreciation allowance on gross revenues of the Company, said:

> "But even so, if the conclusion actually reached was proper, the fact that it was reached by improper methods, would not justify us in disturbing it, so that the more important question is whether the base of the calculation by which it was tested (the restoration of cost, not value, of depreciable property consumed or retired in service), was itself *lawful.*" (Italics ours.) (R. 1649.)

As to this, the Court said that it involved

> "substantive rights protected by constitutional guaranties" (R. 1648), and that "to require the Company to sell its service at rates which made no provision at all for the replacement or repair of the property when worn out or obsolete, would be plain confiscation, and to require it to sell it at rates that make an inadequate provision for the return of its value when worn out or obsolete as a result of public service, can be no less" (R. 1650).

Any incidental imputation of unreasonableness in the opinion of the Court is predicated upon an assumption of unlawfulness, *i. e.*, unconstitutionality. The Court did not rest its opinion upon this ground as an independent base,

nor consider the question in such a manner that it could have done so.

> "The mere ruling that there was evidence sufficient to authorize the consideration of the case from the point of view of negligence alone affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect."
>
> *St. Louis, I. M. & S. R. Co. v. McWhirter* (1913), 229 U. S. 265.

Obviously, the question of the lawfulness of the order in this case *includes* the question as to whether the order is invalid, as a matter of law, under the provisions of the Fourteenth Amendment to the Constitution of the United States. As a matter of fact, the constitutional validity of the order was the *only* question considered by the Court in connection with the *lawfulness* of the order. The opinion is expressly based upon a finding of confiscation, and predicated upon an assumption of the existence of constitutional guaranties. The finding of unlawfulness is tantamount, and only tantamount, to a finding of unconstitutionality.

The Company attacked the order as repugnant to both the Federal and State Constitutions. Article 23 of the Maryland Declaration of Rights (Bagby's Annotated Code of the Public General Laws of Maryland, 1924, Vol. 1, p. 57), provides:

> "That no man ought to be taken, or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land."

This is the only applicable section of the Maryland Con-

stitution. It is coextensive with the Fourteenth Amendment to the Federal Constitution, *Niles, Maryland Constitutional Law*, p. 46. The Court might have rested its decision on either the Federal or the State Constitution, or both. Either, alone, would have been sufficient. The Federal Constitution was, of course, of paramount sanction. For that reason, apparently, the decision is predicated on the Fourteenth Amendment alone. For that amendment is referred to throughout the opinion, while Article 23 of the Declaration of Rights is never mentioned.

It is well settled that where the State court bases its decision in part on non-Federal grounds, which are in themselves broad enough to sustain it, a Federal question presented by the case will not be reviewed by the Supreme Court of the United States, *Consolidated Turnpike Co. v. Norfolk and Ocean View Ry. Co.* (1913), 228 U. S. 596, even though the decision on the non-Federal ground be deemed erroneous. *Arkansas S. R. Co. v. German National Bank* (1907), 207 U. S. 270. And where it does not appear on which of two grounds the judgment was based, and the non-Federal ground is a good and valid one, sufficient in itself to sustain the judgment, the Supreme Court will not review the decision. *Klinger v. Missouri* (1871), 80 U. S. 257.

But the mere fact that the decision *might have been* rested on non-Federal grounds, does not preclude review. *Henderson Bridge Co. v. City of Henderson* (1899), 173 U. S. 592.

In the present case, the State Court might have based its action on non-Federal grounds. It does not appear that it did so. Virtually its sole inquiry was as to the *lawfulness* of the order; it tested that by constitutionality; and its only references indicating detailed judicial consideration are to the Fourteenth Amendment to the Constitution of the United States. Certainly there is no indication that the Court regarded any independent and non-Federal ground as a separate and sufficient basis for its decree.

It may be noted in passing that some doubt might be entertained as to the validity of such State grounds, under the Federal Constitution, even had they been advanced as an independent basis for the opinion. *Georgia Railway and Power Co. v. Railroad Commission of Georgia* (U. S. D. C. N. D. Ga. N. D.—Master's Report, 1924), P. U. R. 1925 A, 546, at 595. But no such question is presented. The decision is rested on a Federal ground, and is a proper subject for review by this Court.

7. The Public Service Commission of Maryland has the legal capacity to prosecute this application for a writ of certiorari, to review the decision against it by the Court of Appeals of Maryland. See the following cases:

Blodgett v. Silberman (April 16, 1928), 72 Law Ed. 470, at 472:

In this case the State Tax Commission of Connecticut computed a transfer tax on certain property owned by a resident of Connecticut, which property, however, was physically located in New York. The highest Court of Connecticut held that certain items of such property were not subject to the Connecticut transfer tax because they were not within the taxable jurisdiction of Connecticut, and, therefore, could not be taxed by that State without violating the Fourteenth Amendment to the Federal Constitution. The State Tax Commission thereupon applied for and was allowed a writ of certiorari from the Supreme Court of the United States, to review the adverse action of the highest State Court. The Supreme Court granted the writ and decided the case on the merits; thereby necessarily holding that such a State official had a standing to question in this Court, the decision of the highest Court of his State.

Nor does this case fall within the line of decisions in which the right of public officers and public bodies exer-

cising ministerial functions, to review in the Supreme Court of the United States adverse rulings of the highest Court of the State, under certain circumstances, has been questioned.

Braxton County Court v. West Virginia (1908), 208 U. S. 192.

The rule in question only applies where the officer or body seeking the review does not occupy a representative capacity with respect to the interests which he is seeking to protect.

Board of Liquidation v. Louisiana (1901), 179 U. S. 622.

The Maryland Public Service Commission has been designated by the Court of Appeals of Maryland as

> "the statutory public defender or representative of all interests, save those which are participating in the attack upon the order, since any one not objecting becomes through acquiescence identified with the public, whose rights and interests always are the primary concern of the Commission, which at once asserts and protects them through its official position."

Public Service Commission v. Byron (1927), 153 Md. 464, at page 471.

III.

Statement of the Case.

A full statement of the case has been given under heading A in the petition for a writ of certiorari, and, in the interest of brevity, the statement is not repeated at this point.

IV.

Specification of Errors.

1. The Court of Appeals erred in not reversing the decree of the Circuit Court No. 2 of Baltimore City, dated May 11, 1928, in so far as said decree adjudged and decreed that the annual depreciation allowance of The United Railways and Electric Company of Baltimore, fixed by Order No. 12639 of the Public Service Commission of Maryland, passed on February 10, 1928, should be calculated to restore to the said Company the present value of its depreciable property, and that calculating said allowance so as to restore to the Company the cost of its depreciable property (as was done by the said Commission in the said Order), was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

2. The Court of Appeals of Maryland erred in holding that the annual depreciation allowance of The United Railways and Electric Company of Baltimore, fixed by the Order No. 12639 of the Public Service Commission of Maryland, passed on February 10, 1928, so as to restore to the Company the cost of its depreciable property, and not the present value thereof, was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT.

Summary of the Argument.

Point A—This Court has not decided the question as to whether an annual depreciation allowance of a public utility

should be based on the cost of its depreciable property or on the present value thereof. We submit that it is of great public importance that this Court should determine the question here raised.

Point B—The decision of the Court of Appeals is at variance with the decisions of this Court in cases involving related questions.

Point C—The decision of the Court of Appeals is contrary to the weight of authority. It is contrary to the practice of the Interstate Commerce Commission and to the practically unanimous holdings of State regulatory bodies. It is supported by but two State Court cases and one District Court case.

POINT A.

This Court has not decided the question as to whether an annual depreciation allowance of a public utility should be based on the cost of its depreciable property or on the present value thereof. We submit that it is of great public importance that this Court should determine the question here raised.

The question presented is one of substance. It may affect the depreciation allowance, and, potentially, the rate structure, of every utility subject to regulation. In view of the abnormal advances in prices during the last fifteen years, millions of dollars, in the case of some single utilities, are involved in its determination. In the present case, its decision affects the rates of fare charged by the Company to the public of the City of Baltimore.

The question has not been determined by this Court.

In the proceedings below, the Company contended that this Court had, in the following cases, ruled that a utility's annual allowance for depreciation must be so calculated as

to restore the value of property consumed or retired in service:

Knoxville v. Knoxville Water Co., 212 U. S. 1, 13-14;
Minnesota Rate Cases, 230 U. S. 352, 452;
Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276;
Bluefield Water Co. v. Public Service Commission, 262 U. S. 679;
Brush Electric Company v. Galveston, 262 U. S. 443;
Georgia Railway and Power Company v. Railroad Commission of Georgia, 262 U. S. 625.

In none of these cases was the point involved in this petition directly or indirectly involved or decided.

In the *Knoxville Case, supra*, it was contended by the utility involved that in fixing the value of its property on which it was entitled to earn a fair return, the amount of depreciation suffered in the past and not provided for in the depreciation allowance should be added to the rate base. This claim was, of course, rejected by this Court, which in that connection used the following language:

> "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current retirements, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property depreciate without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the Company to make such provision but its duty to its bond and its stockholders and in the case of public service corporations at least, its plain duty to the public."

It is submitted that this Court was clearly dealing with accrued depreciation, and the right to add it, to the extent it had not been provided for through an annual allowance, to the rate base. The point presented by this petition was not before the Court. The Company, below, contended that the sentence "it is entitled to see that from earnings the *value* of the *property invested* is kept unimpaired, so that at the end of any given term of years the original investment remains as it was in the beginning" means that *property invested,* and not money originally invested, must be returned to the utility through the annual depreciation allowance. There are plain answers to this construction. It does violence to the natural meaning of the words used. The Court speaks of *original investment,* which could not, by any possibility, be held to intend original investment as modified by a subsequent valuation proceeding. Furthermore, the Court, in a subsequent passage in the opinion, used the word "investment" in a context clearly indicating it denoted financial investment, or cost. It said:

> "If, however, the Company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over issues of securities or of omission to exact proper prices for the output, the fault is its own."

The Company, below, also relied on the following quotation from the *Minnesota Rate Cases, supra,* in support of its contention that this Court had held that the depreciation allowance must restore value of property:

> "The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

The quoted language was used, however, with respect to the determination of the utility's rate base. The question

here under consideration was neither discussed nor decided.

In dealing with the effect of the four remaining cases above cited, it must be borne in mind that there is a difference between the *object* of a depreciation allowance, *i. e.*, whether to restore cost or value,—and the *method* employed for arriving at that allowance. The Commission in the present case adopted the *method* of applying a percentage to gross revenues to determine the amount of the Company's annual depreciation allowance, but its *object* was to restore the cost of property consumed or retired in service. Sometimes courts and commissions lump depreciation with the rate of return allowed on the fair value of the property, and express both, without distinction as to amount, as a percentage of that value. This method was adopted in the *Southwestern Bell Telephone Case, supra,* and the *Bluefield Case, supra.* In the *Brush Electric Company Case* and the *Georgia Railway Case, supra,* the allowance for depreciation was expressd as a separate percentage of the value of the properties of the utilities in question. But although the depreciation allowances in these cases, doubtless as a matter of convenience, were *based on* the valuation, as a *method* of determining the annual depreciation allowance, it nowhere appears that the *object* of the allowance was to *restore* the *value* of property consumed or retired in service, or that the allowance granted actually did so. Certainly these cases do not support the contention that, as a matter of constitutional right, the depreciation allowance must restore the value of property. In none of the cases was the point here under discussion raised or dealt with. In probably the greater number of utility rate cases that have come before this Court for review, if not [redacted] in all of them, the object of the depreciation allowance granted has been to restore the cost of property consumed or retired in service. Never has this met with the criticism of this Court. Indeed, as will be seen hereinafter, it has been approved by it.

POINT B.

The decision of the Court of Appeals is at variance with the decisions of this Court in cases involving related questions.

In so far as the case of *Knoxville v. Knoxville Water Company,* 212 U. S. 1, may be regarded as dealing with the question here at issue, by inference from the language there employed, it negatived value, and sustained cost, as the amount to be returned by the annual depreciation allowance. The language above quoted from the opinion lends itself to that construction, and the case has been so construed by other courts having occasion to pass on the matter here at issue.

It has been noted that the case of *Georgia Railway and Power Company v. Georgia Railroad Commission,* 262 U. S. 625, was relied on by the Company, below, as supporting the contention that value of property consumed or retired in service must be restored by the annual depreciation allowance. And yet, after that case had been decided by this Court, and further proceedings were held in the District Court, the case was referred to a Master, whose report reached the conclusion that the question was undetermined by this Court; and that cost of such property, and not value, must be restored; and cited the *Knoxville Case* as authority for that position.

In *Georgia Rwy. and P. Co. v. R. R. Comm.* (U. S. D. C. N. D. Ga. N. D.), P. U. R. 1925 A, 546, at 593, he said:

> "Only two figures are submitted as proper reserve for replacement: $113,563 by Professor Riggs and $150,000 by Mr. Luick. The Commission, as its report shows, took 2 per cent. on the 'undepreciated fair value' of the physical properties as a proper allowance for this item, and *fixed that value at historical cost.* (Italics ours.) Mr. Luick estimated 2 per cent. of the depreciable physical properties, excluding land, as the proper basis on which to arrive at reserve for replacement. Neither the Special Tribunal nor the Supreme Court

made a definite ruling on this question, but neithe
Court disturbed the amount of reserve as found by th
Commission. The fixing of this figure does not, i
seems to the Master, involve valuation, but an esti
mated allowance for the purpose of preserving the in
vestment. In valuing the property, present valu
should be found, but the reserve should be applied t
the investment, rather than the present value figure
since the reserve ought to be, and is, on principle, cre
ated to keep the investment intact.

"The Supreme Court in Knoxville v. Knoxvill
Water Co., 212 U. S. 1, 13, in discussing this questio
says:

" 'The Company is not bound to see its property
gradually waste without making provision out of earn
ings for its replacement. It is entitled to see that from
earnings the value of the property invested is kept
unimpaired, so that, at the end of any given term of
years, the original investment remains as it was at the
beginning.'

"* * * It has been well said that 'The full value of
the investment can be maintained provided there is
restored to the Company each year such sums of money
that, when each item of the plant can be no longer
used, there will be in the possession of the company—
money and useful plant or useful plant alone, equal
in value to its original cost.' (Hayes on 'Public Utili-
ties, Their Fair Present Value and Return,' page 33.)

"Lyndon in his book on 'Rate Making for Public
Utilities,' page 17, says:

" 'Depreciation reserve is a fund, the sole purpose
and use of which is to preserve the integrity of the
original investment required to produce the operating
plant.'

"Hayes, again, in his 'Public Utilities, Their Fair
Present Value and Return,' on page 162, in discussing
this question, says:

" 'It is usual to set aside each year a portion of their

cost, so that, when an item has reached the end of its life and must be removed, there has been reserved an amount equal to its original cost.'

"To allow a reserve which, during the estimated life of the plant, would amount to more than the original investment, would be to give the utility, out of rates collected from the public, not only a reserve sufficient to keep its investment 'unimpaired, so that at the end—the original investment remains as it was at the beginning,' but additional capital also. The utility should be allowed reserve for replacement sufficient to keep the investment unimpaired, and, in addition, a fair return upon the present value of the property, but the public should not be required to build up, in the form of maintenance reserve, additional capital for the utility. The Master does not agree that 2 per cent. on the undepreciated present value of the depreciable physical properties is the proper amount to allow for reserve in this case. To allow reserve on this basis would, to the extent of the additional capital furnished by the public, amount to the confiscation of the property of the users of gas."

It is submitted that not only has this Court never announced the rule laid down by the Court of Appeals of Maryland in the instant case, but that the decision of the Court of Appeals of Maryland is contrary to the spirit and intendment of decisions of this Court, as the same have been judicially interpreted.

POINT C.

The decisions of the Court of Appeals is contrary to the weight of authority. It is contrary to the practice of the Interstate Commerce Commission and to the practically unanimous holdings of State regulatory bodies. It is supported by but two State Court cases and one District Court case.

Knoxville v. Knoxville Water Company, 212 U. S. 1, and *Georgia Railway and Power Company v. Georgia Railroad*

Commission (U. S. D. C. N. D. Ga. N. D.), P. U. R. 1925 A, 546, have already been cited as expressing the conclusion reached by the overwhelming majority of well-considered cases,—that cost, and not value, should be restored by the annual depreciation allowance.

The following decisions support that practice, which has developed and been in force for decades of regulatory experience, is embodied in the Rules of Accounting of the Interstate Commerce Commission and of most State regulatory bodies, and has seldom been questioned by any utility affected.

Re Missouri Union Telephone Co. (Mo. P. S. C.), P. U. R. 1926 A, 842, at 849:

> "In calculating the annual depreciation allowance, it must be borne in mind that the purpose of a depreciation reserve is to retire the investment in depreciable property at the end of its useful life. The depreciation reserve is a retiral reserve, and not a replacement reserve. Consequently, any estimate of the annual depreciation requirement should be based upon the investment in depreciable property. Should the cost of a new item of property exceed the cost of the item of property displaced, the excess is properly chargeable to capital account; and such excess must ultimately be provided for through the sale of stocks or bonds or both. The creation of a reserve in excess of the amount required to retire the investment in depreciable property at the end of its life results in collecting an excess sum from the consumer to finance additions and betterments in full or in part, which is unjust, inequitable and illegal. The point to be emphasized is that no matter what the present fair value of a property may be, or what its cost of reproduction may be, the actual cost of the depreciable property is

the basis upon which the annual depreciation requirement should be calculated."

See also—

Re Capital City Water Co. (Mo. P. S. C.), P. U. R. 1925 D, 41, at 56;

Re Kansas City Gas Co. (Mo. P. S. C.), P. U. R. 1925 A, 653, at 663.

Re Jackson County Light, Heat and Power Co. (Mo. P. S. C.), P. U. R. 1926 D, 737, at 754:

"In calculating the annual depreciation allowance, it must be borne in mind that the purpose of a depreciation reserve is to retire the investment in depreciable property at the end of its useful life. The depreciation reserve is a retiral reserve and not a replacement reserve. Consequently, any estimate of the annual depreciation requirement should be based upon the investment in depreciable property."

Aluminum Goods Mfg. Co. v. Laclede Gas Light Co. (Mo. P. S. C.), P. U. R. 1927 B, 1, at 43:

"The purpose of a depreciation reserve is to retire the actual cost of the depreciable property at the end of its useful life. It, therefore, follows that the annual depreciation allowance should be based upon the original cost of the depreciable property."

Re Kinloch-Bloomington Teleph. Co. (Ill. Commerce Comm.), P. U. R. 1927 E, 135, at 142:

"Without going into a detailed discussion of this matter, it might be said that the purpose of the reserve and the accounting rules of this Commission and the Interstate Commerce Commission precludes setting aside a depreciation reserve based on present day cost. According to accepted theories, the amount that should be provided for in the reserve is the original cost of the property in service. When replacements are

made, the difference between the original cost of property retired and the present day cost of that installed is an addition to capital account. If the books of the Company have been accurately and properly kept, and this has continued since the conception of the Company, then the original cost of the property should be identical with the book cost, and by retiring the original cost of any item or items of property from the record, the figures still remaining on the books would accurately reflect the original cost of the property remaining in plant. It is not the purpose of the reserve to produce capital, but simply to protect the capital invested in the property, and in arriving at the amount that should be set aside annually as a reserve for accruing depreciation, an estimate based on the present cost of the property should receive little or no weight in such consideration."

Freeport v. Freeport Gas Co. (Ill. Commerce Comm.), P. U. R. 1924 E, 99, at 103:

"That a public utility is not required to see its property depreciate without making a provision to offset such depreciation is a point which has been clearly settled by the United States Supreme Court.

"As this Commission understands the law, the utility is required annually to set aside a sum which is sufficient to replace the cost of the property at the expiration of its useful life; and in speaking of the cost, the Commission refers to the actual original cost of each unit in operation. This is the manner in which the Commission's uniform classification of accounts for utilities directs the accumulation of depreciation reserve. The Commission, therefore, in this case will fix the allowance for the annual depreciation on the original cost of the property."

Re Rockford Gas Light and Coke Co. (Ill. Commerce Comm.), P. U. R. 1922 E, 756, at 761:

"The Commission is of the opinion that the annual accruing depreciation should be based on the original cost of the property rather than on the reproduction cost, as submitted by the petitioner, because it is the original cost of the property which must be accumulated to safeguard the investment for the investor. This is the method contemplated by the uniform system of accounts—as adopted by the Commission * * *."

Re Rockford Electric Co. (Ill. Commerce Comm.), P. U. R. 1925 D, 154, at 166:

"Witnesses for the utility contended that the annual retirement allowance should be based on the reproduction cost of the property. This is a proposition to which the Commission does not agree. The classification of accounts prescribed for electric utilities contemplates the retirements of property shall be made at their original cost and that replacements, if costing more than the property retired, shall be added to the capital account at the difference between replacement and original cost. An allowance for annual retirement expense must, therefore, be based upon the original cost of the property and not upon the reproduction cost."

Baird v. Burleson (N. Y. P. S. C. 2nd Dist.), P. U. R. 1920 D, 529, 538:

"An official of the Company testified that in computing the annual depreciation the value is computed not on the book cost, but on an estimated reconstruction cost. The more usual method is to adopt as the retirement loss the difference between the original cost and the salvage value.—This (the Company's method) is not the method contemplated in the Commission's accounting classifications, and we consider it objection-

able in that it does not apportion the retirement loss equitably as between the present and future users of the service, and introduces an additional element of conjecture by requiring an estimate of future replacement cost as well as of probable life in service."

Milwaukee Electric R. & L. Co. v. Milwaukee (Wis. R. R. Comm.), P. U. R. 1918 E, 1, at 58:

"As we understand it, a reserve set up to provide for the renewal of property should provide amounts sufficient to protect the utility from loss when property is retired from service. This is equivalent to saying that the amount of the reserve to be provided should be equal to the cost of the property which will have to be replaced, and not the amount of an estimated cost of reproduction of that property."

Re Wisconsin-Minnesota Light and P. Co. (Wis. R. R. Comm.), P. U. R. 1920 D, 428, at 435:

"The question of depreciation reserves was discussed at length in the case of Milwaukee Electric R. and Light Co. v. Milwaukee, 21 Wis. R. C. R., pp. 28-31, inclusive (P. U. R. 1918 E, 1). We call attention at this time to the fact that the Commission there showed its reasons for its conclusions on the question of depreciation and that it was then the opinion of this Commision that it should, as has in fact been the practice of the Commission at all times, establish depreciation reserves upon the original cost basis or upon a basis as near thereto as could be ascertained. It was there said:

" ' * * * Depreciation reserve, however, should be set aside not on the basis of such variation, but with relation only to the original cost or investment, any excess cost in renewals and replacements over and above original cost finally to go to capital account.' "

Re Butler Telephone Co. (Ind. P. S. C.), P. U. R. 1927 C, 800 at 804:

"The Commission believes that one purpose of book cost being kept, so as to be actually an historic cost of the property, is that retirements on account of depreciation may be made at cost of installation rather than at appraised cost of reproduction. At the present time, this is fair to the patrons of the utility. In the future, the appraised cost of reproduction may be less than the actual cost of installation. This result is very probable as to installations made during the period of peak prices. In that event, fairness to the company would require that the same rule be followed."

Re Lebanon Teleph. Co. (Ind. P. S. C.), P. U. R. 1925 B, 225, at 229:

"Depreciation should be calculated on the actual or book cost of the property excluding land."

See also—

Re Indianapolis Water Co. (Ind. P. S. C.), P. U. R. 1925 C, 431 at 438.

Re Butler Telephone Co. (Ind. P. S. C.), P. U. R. 1925 A, 240, at 242:

"The accrual of depreciation on a reproduction basis is improper. The accrual should be made on the basis of the cost of the property."

Re Coast Gas Co. (N. J. Bd. of P. U. C.), P. U. R. 1923 A, 349, at 366:

"The Board's uniform system of accounts—provides that 'when anything (not including minor parts, the renewal of which is considered a repair) is withdrawn or retired from service, the amount at which it stood charged shall be credited to the account in which it stood charged at the time of withdrawal.' The same

uniform system requires that the original entries should be the actual money cost of the property; it is evident that the retirement is to be based upon the money or investment cost of property, and should not be largely increased through being related to varying appraised values."

Re Elizabethtown Water Co. (N. J. Bd. of P. U. C.), P. U. R. 1927 E, 39, at 63:

"The annual depreciation, however, should be related to the book or investment cost."

Re Duluth Railway Co. (Minn. R. R. and W. Comm.), P. U. R. 1927 A, 41, at 53:

"The purpose of setting up depreciation is to restore investment."

Re Big Spring Electric Co. (Utah P. S. C.), P. U. R. 1927 A, 655, at 666:

"It appears to the Commission that in this case it is proper to apply depreciation on the investment, rather than reproduction value."

Re Phillipine Shipowners' Association (P. I. P. S. C.), P. U. R. 1921 C, 536:

"With regard to the basis for computing the percentage of depreciation, the Commission maintains that it must be the cost of the investment, because if the theory sustained in this respect by the counsel for the petitioning shipowners in their reply (cost of replacement basis), above referred to, were to be accepted, the burden of the capitalization of the business of the petitioning shipowners would be thrown upon the public, while the principal purpose of writing off the depreciation is to return to them their capital investment within a period of time estimated by the life of the property used for the public service."

The practice of the Interstate Commerce Commission is at variance with the ruling of the Maryland Court of Appeals. See Depreciation Charges of Telephone Companies and Depreciation Charges of Steam Railroad Companies, 118 I. C. C. 295, at page 344. It is there said:

> "It is agreed by all that depreciation expense should be based primarily upon the original cost to the accounting company of the unit of property in question. The principle is precisely the same in the case of the expense incurred over a period of years in the consumption of long-lived property in service, as it is in the case of the expense incurred in the more immediate consumption of such property as coal. In both cases, the cost of the property in question is the basis of the charge to operating expenses."

See also *Whitten-Wilcox, Valuation of Public Service Corporations* (2nd Edition, 1928), Vol. 2, p. 1829, where the practice of the American Telephone and Telegraph Company is thus described:

> "(a) Accruals should be based on original cost or investment.
>
> "All telephone property, excepting land, is subject to depreciation and the continual consumption of the investment is a part of the cost of the service and must be provided for by charges against earnings.
>
> "The sound theory is that the charges to the reserve for depreciation should be based on the original cost of the property retired, less the net salvage credit. This is demonstrated by the following considerations:
>
> "(1) The function of the depreciation reserve is to amortize the portion of the expense of conducting the business caused by using up its depreciable property.
>
> "(2) The actual amount of this expense is the original cost of its property less net salvage credit.
>
> "(3) This method is equitable in that it provides for

the amortization of the actual investment during the period it is consumed in rendering the service.

"(4) Upon this theory the amount to be created by the reserve is definite and fixed so that the periodical charges to operating expenses on account of the reserve can be made certain.

"(5) This method tends to certainty and definiteness in the accounting."

It is true that there are cases to the contrary, and for the information of the Court we cite them:

United Fuel & Gas Co. v. R. R. Commission (1925), 13 Fed. (2nd) 510 (District Court, Kentucky);

Michigan Public Utilities Com. v. Michigan State Telephone Co. (1924), 228 Mich. 658;

Cincinnati & Suburban Bell Telephone Co., P. U. R. 1924 E, 849 (1924 Ohio Public Utilities Commission);

Hopkins v. Southwestern Bell Telephone Co. (1924), 115 Kan. 236.

In the case first cited the Court was dealing with a natural gas company and the question of depreciation was intermingled with the question of *depletion*. The Court's conclusion is not supported by the citation of any authority, and *the Supreme Court cases relied on by our opponents are not even mentioned.*

It will be noted that all of these cases were decided before November 2, 1926, the date of the report of the Interstate Commerce Commission above referred to, and were thus available to it before it reached its conclusion. The Interstate Commerce Commission did not, therefore, regard them as authoritative.

Finally, if the method contended for by the Public Service Commission in this case results, as claimed, in a continuous confiscation of the property of the Railways Com-

pany, why, it may be asked, did the American Telephone & Telegraph Company and the steam railroads of the United States strenuously contend before the Interstate Commerce Commission that retirements should be written off at cost figures instead of valuation figures?

The above decisions and practices are founded upon the fact that if the public were to be required to restore to the utility through the annual depreciation allowance the value, rather than the cost, of depreciable property consumed or retired in service, it would be compelled to contribute new capital to the Company to the extent of the excess of cost of replacement of new property acquired over the original cost of old property retired, and would in turn be required to pay a fair return on the new capital so contributed. Such a concept is wholly at variance with the fundamental theories of regulation, whereunder the utility dedicates property provided by it to the public use, and the public pays a return for the use of that property.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the provision of the decree of the Court of Appeals of Maryland herein, holding that the failure of your petitioners, constituting the Public Service Commission of Maryland, to grant to the United Railways and Electric Company of Baltimore, appellee and cross-appellants therein, an annual depreciation allowance that would restore to it the present day value of its property consumed or retired in service, is confiscatory within the prohibition of the Fourteenth Amendment to the Constitution of the United States, may be set aside, and that to

such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Appeals of Maryland, and finally reverse it.

RAYMOND S. WILLIAMS,

THOMAS J. TINGLEY,

Counsel for Petitioners.

Baltimore, Maryland,

April 27th, 1929.